

Shanti Devi Progressive Vs. Assistant Director of Income-tax

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Sep-28-1998

Reported in : (1999)68ITD1(Delhi)

Appellant : Shanti Devi Progressive

Respondent : Assistant Director of Income-tax

Judgement :

1. This appeal by the assessee is directed against the order of the Commissioner of Income-tax (Appeals)-XVI, New Delhi. It pertains to the assessment year 1993-94.

2. Briefly the facts : The assessee is a Society. It was registered on 10-7-1985 with the Registrar of Societies vide No. S-15825. It was also registered under section 12A of the Income-tax Act, 1961 (hereinafter called the Act) on 15-10-1985. Exemption as contemplated under section 80G of the Act was also granted to the assessee from time to time. The society is running two schools in Mayur Vihar styled as Ahicon Public School and Ahlcon Nursery School. The schools are said to be recognised by the Delhi Administration. It was stated that up to assessment year 1992-93 the society had been granted exemption under section 10(22) of the Act. During the relevant year of assessment assessee filed return on Form No. 3A. Exemption was claimed under section 10(22) and alternatively under section 11 of the Act. It was not allowed on the ground that the society is existing for the purposes of profit.

3. Shri P. L. Juneja, learned Counsel for the assessee appeared before us. Relevant documents and papers were filed. It was vehemently contended that the society is solely existing for the educational purposes. It complied with all the requirements which are sine qua non for availing the exemption contemplated under section 10(22) of the Act.

3.1 It was stated that in the preceding year exemption under section 10(22) was granted to the assessee. Reference was made to the case of Dhansiram Agarwalla v. CIT [1996] 217 ITR 4/[1995] 81 Taxman 1 (Gauhati), wherein it was held that neither the principles of res judicata nor the rule of estoppel is applicable to the assessment proceedings, yet the rule of consistency does apply to such proceedings. Learned Counsel argued that the accounts were not rejected. There was no change. Similar facts exist in the year under consideration also. It is, therefore, imperative on the part of revenue to maintain consistency.

3.2 The Society is not distributing profits or is applying profits for the benefits of the members of the Managing Committee. There is absolutely no evidence that Ahluwalia Construction Co. derived any undue profits out of the construction work. It was pointed out that in the case of Samaritan Society v. CIT [1997] 225 ITR 652 (SC), Tribunal found that objects of the trust were charitable. Trustees were empowered to carry on business. It was to enable the trust to carry its charitable objects in a more effective manner. Exemption was allowed under section 11 of the Act.

3.3 There is absolutely no evidence to demonstrate that there exist profit motive in running the educational institutions. The predominant object of the Society was to run schools and not to earn profit.

Exemption cannot be denied to the trust because some profit arises from the activity. Reliance was placed on the following : (1) CIT v. Andhra Pradesh State Road Transport Corpn. [1986] 159 ITR 1/25 Taxman 63A (SC).

(2) Educational Institute of Amercian Hotel & Motel Association v. CIT [1996]219 ITR 183/85 Taxman 666 (AAR).

(3) Governing Body of Rangaraya Medical College v. ITO [1979] 117 ITR 284 (AP).

(4) Addl CIT v. Surat Art Silk Cloth Mfrs. Association [1980] 121 ITR [1979] 2 Taxman 501 (SC).

(5) Aditanar Educational Institution v. Addl CIT [1997] 224 ITR 310/90 Taxman 528 (SC).

3.4 It was contended that the law is trite on the subject. The issue is covered by the decisions of the Apex Court. If Supreme Court has construed the meaning of section then any decision to the contrary given by any other authority must be held to be erroneous and such error must be treated as an error apparent on record. Reference was made to the decision of Poothundu Plantations (P.) Ltd. v. Agri. ITO [1996] 221 ITR 557 (SC).

3.5 The Society was said to be existed solely for educational purposes and not for the purposes of profits. It was argued that the position must be determined with reference to the cumulative effect of all relevant facts. Reference was made to the decision of Birla Vidhya Yihar Trust v. CIT [1982] 136 ITR 445/[1981] 7 Taxman 391 (Cal.).

3.6 Our attention was also invited to the decision of the CIT v. Academy of General Education [1984] 150 ITR 135/16 Taxman 418 (Kar.).

In this case assessee was running nine educational institutions and controlling twenty two others. It had other income also. Income of educational institutions controlled or run by assessee not included in its income. No amount was spent on any purpose unconnected with education. Exemption under section 10(22) of the Act was allowed.

3.7 The admission fee charged was treated as capital item. It was, therefore, taken towards the corpus of the trust fund. It was not open to the Assessing Officer to make addition on this count. It was not a revenue receipt. It was incumbent on Assessing Officer to prove that this receipt was eligible to tax. Reference was made to the decision of Udhavdas Kewalram v. CIT [1967] 66 ITR 462 (SC).

3.8 Our attention was invited on Circular F. No. 194/16-17-IT(A1). The relevant portion of the said circular is reproduced hereunder :- "The question for consideration is whether an educational institution existing solely for educational purposes but which shows some surplus at the end of the year is eligible for this exemption.

If the profit of the educational institution can be diverted for the personal use of the proprietor thereof, then the income of the educational institution will be subject to tax. However, there may be cases where the educational institutions may be owned by the trusts or societies to whom the provisions of section 11 may be applicable. Where all the objects of these trusts are educational, and the surplus, if any, from running the educational institution is used for educational purposes only, it can be held that the institution is existing for educational purposes and not for purposes of profit. However, if the surplus can be used for non-educational purposes, it cannot be said that the institution is existing solely for educational purposes and such institutions will not be liable for exemption under section 10(22). But, in such cases, the applicability of section 11 can be examined and if the conditions laid down therein are satisfied, the income will be exempt under section 11." It was submitted that the benevolent CBDT Circulars are, binding on the revenue. Reliance was placed on the decision of *Rajan Ramkrishna v. CWT* [1981] 127 ITR 1/[1980] 4 Taxman 67 (Guj.).

3.9 The learned Counsel also relied on some precedents to buttress the claim.

4. Sri B. K. Haldhar, learned Departmental Representative appeared before us. It was stated that as because the principle of *res judicata* is not applicable to decisions of income-tax authorities, an assessment for a particular assessment year is final and conclusive between the parties only in relation to that year. It was argued that the case of the assessee is falling beyond the ken of section 10(22) as because the assessee is carrying on the educational institution for the purposes of making profit. As per the circular an educational institution existing solely for educational purposes, is eligible for exemption. The implication of the words "some surplus" was explained. It was stated that surplus should be incidental and must not be germane to the profit making activities. The facts of the case go to

demonstrate beyond the shadow of doubt that the motive of the assessee was to earn profit. The assessee took donation from the parents at the time of admission of their wards to the time of Rs. 17,24,005. It also collected donations through employees by issuing coupons. All these funds were collected at the time of fresh admission during the period 4-3-1993 to 16-3-1993.

This is against law. Not only that it took loans during the period December 1992 to 31-3-1993 in cash as well as by cheques amounting to Rs. 10,85,000 at the nominal rate of interest. There is no evidence that the assessee returned that money. Evidence of returning the money to the extent of Rs. 10,000 only was placed before the revenue authorities.

4.1 It was pointed out that veracity of the assessee's claim apropos the donations and loans could not be examined for want of the evidence.

No confirmation letters were filed before the revenue authorities for donations and loans.

4.2 Admittedly the donations were taken from the parents of the students. Such donations cannot be construed to be voluntary donations as these were taken for granting admission. There existed quid pro quo voluntary contribution would mean contribution other than those by beneficiaries of the services.

4.3 In regard to the admission fees, it was stated that the same was not reflected purposely as the revenue receipt. The Delhi School Education Act, 1973 (hereinafter called DSE Act, 1973) prohibits such receipts. The Act of accepting the admission fee beyond the limit prescribed is against the provision of the law.

4.4 It was submitted that the surplus was generated year after year in a systematic manner. In the name of education assessee is earning profit. The school building is being constructed by Ahluwalia Construction Pvt. Ltd. This is a family concern of Ahluwalia, who was the member of the society. No tender was called for awarding the construction work of the building.

4.5 It was further stated that while taking loans and depositing the money it is benefiting a non-nationalised private bank and the possibility of the members of

the executive body getting direct or indirect benefit from the investments in a private bank cannot be ruled out.

4.6 It was argued that tax concessions afforded to these institutions involved a sacrifice of the public revenue. Therefore, it is necessary to see that such concessions be not abused. In the circumstances of the case, it is quite clear that donations received by the assessee are not "voluntary". The dominant intent is to earn profit. Merely because society is not distributing profit or is applying the profits is not enough for it to claim exemption. Reliance was placed on the decision of the Apex Court rendered in the case of Safdarjung Enclave Education Society. MCDAIR 1992 SC 1456.

5. We have heard the rival submissions in the light of material placed before us and the precedents relied upon. Section 10(22) reads as under :- "In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included - (22) any income of a university or other educational institution, existing solely for educational purposes and not for purposes of profit;" An educational society can be regarded as an educational institution if the society is running an educational institution. Even if a certain surplus results on the working of the society, it cannot be said that the institution run by it was so for the purpose of profit so long as no person or individual was entitled to any portion of the said profit and the said profit was utilised for the purpose of, and promotion of the objects of the institution.

5.1 In the case of Surat Art Silk Cloth Mfrs. Association (supra) it was laid down that the test which has to be applied is whether the predominant object of the activity involved in carrying out the object of general public utility is to subserve the charitable purpose or to earn profit. Where profit-making is the predominant object of the activity, the purpose, though an object of general public utility, would cease to be a charitable purpose. But where the predominant object of the activity is to carry out the charitable purpose and not to earn profit, it would not lose its character of charitable purpose, because some profit arises from the activity.

5.2 In the case of Aditanar Educational Institution (supra) the Apex Court has held that the language of section 10(22) of the Act is plain and clear and the availability

of the exemption should be evaluated each year to find out whether the institution existed during the relevant year solely for educational purposes and not for purposes of profit. After meeting the expenditure, if any surplus results incidentally from the activity lawfully carried by the educational institution, it will not cease to be one existing solely for educational purposes, since the object is not one to make profit. The decisive or acid test is whether, on an overall view of the matter, the object is to make profit. In evaluating or appraising the above, one should also bear in mind the distinction/difference between the corpus, the object and the powers of the concerned entity.

5.3 The word "incidental" as defined in Chambers' 20th Century Dictionary, means in an incidental way : loosely by the way, parenthetically, as a digression. It refers to a subordinate action that which naturally belongs to or is consequent or something else.

According to Black Law Dictionary (Fifth Edition) page-686, "incidental" means depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to main purpose. The prescription of section 10(22) will hold good so long surplus is incidental. The moment it comes out that surplus resulted on a calculated basis, the entitlement under section 10(22) will get vanished.

5.4 We find that the society has received admission fees of Rs. 10,85,000. This amount was taken to the balance sheet. It is not clear as to how and under what circumstances the amount was treated as capital receipt. Section 146 of the DSE Act, 1973 prescribes as under :- "146. Admission Fees - (1) No admission fee shall be charged or collected by an aided school for admission to any class up to class VIII. (2) An admission fee of Rs. 3 per student shall be charged and collected by the aided school for admission to any class in the Secondary or Senior Secondary stages but where a student has already paid an admission fee, no admission fee shall be charged on his promotion to any higher class in the same school; but if he joins any other aided school that other school may charge and collect admission fee from him.

(3) No admission fee shall be charged or collected by an aided school from a student who is exempted from payment of tuition fees, and, only one-half of the specified admission fees shall be charged from a student who is required to pay tuition fees at the rate of one-half of the specified rate." 5.5 The assessee received donations to the tune of Rs. 17,24,005. This amount also comes from students. There is no confirmation from the donors. If the donation is paid towards corpus it is incumbent on the assessee to prove that the amount was collected with such mandate. No such evidence was brought before us. Part of the corpus fund (amounting to Rs. 2,55,500) was collected by issuance of coupons during the admission time. Sections 155 and 156 of the DSE Act, 1973 read as under :- (1) No aided school shall levy or collect any donation compulsorily from any student or any parent or guardian of any student.

(2) No aided school shall collect any donation through its students for the aid of teachers or for any fund for the aid of teachers.

(3) Voluntary donations collected by the managing committee of an aided school shall be accounted for separately and may, at the discretion of the managing committee be utilised for meeting the managing committee's share of the expenses referred to in sub-section (2) of section 10.

(4) In computing the grant-in-aid, voluntary donations collected by the managing committee of an aided school not be taken into account.

156. Collection of fees or donation with the approval of the Director - (1) The managing committee of an aided school may, with approval of the Director, also invite voluntary contributions from the parents or guardians of the construction of any building for the school or its hostel or for the extension of any such building or hotel.

(2) No appeal for any such contribution as is referred to in sub-rule (1) shall be made at the time when admissions are made to the concerned school or when results are declared by the school." 5.6 Coming now to the loans taken from the parents, we find that the assessee did not furnish confirmations. There is no evidence that all such loans were returned.

5.7 Section 10(22) was enacted to promote the cause of education. In our national perception education is essentially for all. This is fundamental to our all round development. The predominant object of enacting a tax statute is to find moneys for running the wheels of administration. But the taxing statute seeks to accomplish many other purposes and objects for the well-being of the people at large. A taxing statute does not always proceed to charge and levy tax; it often leaves out and exempts certain persons, objects, transactions or the effects from its pricks-and that with various considerations and results in mind. Clause 22 of section 10 guards educational progress.

Education is one of the ingredients of the charity.

5.8 From times immemorial, private philanthropy, in our country, has been playing a very special and prominent role in enriching our cultural heritage and in catering to the educational, medical, socio-economic and religious needs of our countrymen. In doing so, it has supplemented the work of a welfare state; in turn the State has, on its part, recognised this contribution by giving generous tax concessions to the charitable institutions.

5.9 The liberal tax concessions provided by the State for the cause of charity have, however, been found at times to be abused with impunity and utilised for fulfilling personal ends. The profile of fiscal jurisprudence tempted the human ingenuity to defile the cause of charity.

5.10 Now, since the tax concessions afforded to these institutions involve a sacrifice of public revenue, it becomes imperative to ensure that tax concessions are not abused, and that they are enjoyed only by those charitable institutions which actually deserve them. The object of charity requires vigilance of law which, while allowing liberal interpretation watches to see that the object of charity is not defeated and the perpetual spring of nectar is not, because of too strict laws or their too rigid interpretation, drawal up into empty sands.

5.11 The law of onus, as canonised in the dictum : *Incumbit probatio qui dicit non qui negat* (burden lies upon one who alleges and not upon one who denies) takes a different shape when it comes to the claim of exemption from tax levies. In such

cases, the burden is on the party who claims exemption, to prove the fact that entitles him to the exemption. In order to be entitled to an exemption, an assessee must strictly come within the terms of the provisions under which such exemption is being claimed. In a fiscal provision, if benefit of exemption is to be considered, it should be construed strictly. It must be seen that tax concessions are not abused.

5.12 In the case of Safdarjung Enclave Education Society (supra), it was held that merely because education is imparted in the school, that by itself, cannot be regarded as a charitable object. An element of public benefit or philanthropy has to be present. Today education has acquired a wider meaning. If education is imparted with a profit, motive, to hold, in such a case, as charitable purpose, will not be correct.

It was further held that a voluntary contribution cannot amount to a compulsive donation. if the donor, in order to gain an advantage or benefit, if he apprehends that but for the contribution some adverse consequence would follow, makes a donation certainly it ceases to be voluntary.

It was laid down that merely because the society is not distributing profits or is applying the profits is not enough for it to claim exemption.

5.13 In charity, there must not be quid pro quo. It should be by way of bounty. It cannot be by way of bargain. The exemption given under section 10(22) of the Act is available to educational institutions and not to the educational shops. Therefore, it is important to see the purpose. If the institution is running for the purposes of profit-benefit of section 10(22) cannot be given.

5.14 Charity include within its ambit all those voluntary acts which are dictated by the desire to do good. The term 'voluntary' conveys that the act of charity must be without any expectation for any consideration therefor. The purpose of charity will not be defeated if some reasonable amount is charged for the services given. We do not think that a school would be prevented from being a charity because the boys who received its benefit paid for their education a moderate sum proportionate to their means.

5.15 Assessee received admission fees of Rs. 10,85,000. Clearly assessee did not follow the prescription of section 146 of the DSE Act, 1973. The appeal for contribution was made at the time of admission.

This is against the provisions of section 156(2) of DSE Act, 1973.

Section 155 prescribes that donations not to be levied compulsorily from any student or any parent or guardian of any student. From the surrounding circumstances it appears that donation played an important role in granting the admission to the students. The very fact that it was given at the time of admission shows its nexus with the admission of the students. Therefore, it cannot be construed to be voluntary donation. The element of public benefit philanthropy is missing.

Surplus is not resulting incidentally. It resulted on a calculated basis. The activity carried out by the Society is also not in consonance with the canons set out in DSE Act, 1973. In these circumstances department was not bound to follow the earlier orders.

5.16 Having regard to the facts and after careful considering the precedents relied upon, we are of the opinion that the Society existed for the purposes of profit. As such the case of assessee is beyond the key of section 10(22) of the Act. We, therefore, uphold the impugned order on this count.

6. Alternatively it was argued that the ground apropos the applicability of section 11 of the Act was not adequately considered in the impugned order. We have perused the order of the CIT(Appeals). The case of the assessee needs to be tested on the touchstone of section 11. This was not done. We, therefore, set aside the impugned order on this count and restore the matter to the file of CIT(Appeals) with direction to decide the issue de novo after providing adequate opportunity to the assessee of being heard.

1. I have read at length the order of my learned brother, the Judicial Member, but in spite of much self persuasion, I have not been able to concur with the view expressed by him to deny the benefit of section 10(22) to the appellant.

2. At the outset, I must state that the facts of the case and the arguments of the parties are ably set out by my colleague, the Judicial Member, in paras 2 to 4.6 of his order and with which I can have no quarrel. In para 5 of his order, the Id. Judicial Member has categorically observed that a surplus may result in running an educational institution and "it cannot be said that the institution was so run for the purposes of profit so long as no person or individual was entitled to any portion of the said profit and the said profit was utilised for the purpose of, and promotion of the objects of the institution". I agree with him. In the present case, there is no finding by any of the tax authorities that any part of the profit found its way to the pocket of any individual or individuals or any part of it was utilised for any purpose or purposes which were non-educational in character. The cursory observations in the orders of the tax authorities are in the realm of surmises and conjectures bordering on suspicion and these by no stretch of imagination can replace hard facts. Even the Id. Judicial Member has not adversely commented on this factual aspect.

3. In para 5.1, the Id. Judicial Member has discussed the judgment of the Hon'ble Supreme Court in the case of Surat Art Silk Cloth M/s.

Association (supra) once again referring to the question of surplus/profit bringing out the importance of an activity whether carried out for a charitable purpose or to earn profit. According to him, where the pre-dominant object of the activity was to carry out the charitable purpose and not to earn profit, it would not lose its character of charitable nature just because some profit arises from the activity.

4. It may be mentioned that the decision of the Hon'ble Supreme Court pertained to the question of exemption under section 11 where the considerations are somewhat different to those envisaged by section 10(22). The Id. Judicial Member has already extracted section 10(22) in para 5 of his order and this speaks of an institution existing solely for educational purposes and not for purposes of making profit. In other words, the "purpose" is the deciding factor unlike section 11 where the items "charitable object" and "voluntary contributions" assume importance. The latter two items in my opinion are not relevant to decide the question of exemption under section 10(22).

5. In case the ratio of the judgment of the Supreme Court in the case of Surat Art Silk Cloth Mfrs. Association (supra) is imported into the present question of exemption under section 10(22), then it could be held that profit should not be the predominant object but which should be the imparting of education and which would not cease to be so just because some profit arises from the said activity.

6. In para 5.2, the Id. Judicial Member has referred to the decision of the Hon'ble Supreme Court in the case of Aditanar Educational Institution (supra) more so the following observations at page 312 of the report :- "The language of section 10(22) of the Act is plain and clear and the availability of the exemption should be evaluated each year to find out whether the institution existed during the relevant year solely for educational purposes and not for purposes of profit.

After meeting the expenditure, if any surplus results incidentally from the activity lawfully carried on by the educational institution, it will not cease to be one existing solely for educational purposes, since the object is not one to make profit.

The decisive or acid test is whether, on an overall view of the matter, the object is 'to make profit' In evaluating or appraising the above, one should also bear in mind the distinction/difference between the corpus, the objects and the powers of the concerned entity." 7. He has thereafter discussed the term "incidental" to ultimately hold that it is something apportioning to or depending upon the primary or main purpose. According to him, the moment it appears that the surplus resulted "on a calculated basis", the entitlement of section 10(22) would vanish.

8. A reference to pages 311 and 312 of the report shows the following fact :- "The assessee was a society registered under the Societies Registration Act, 1960. Its objects were to establish, run, manage or assist colleges, schools and other educational organisations existing solely for educational purposes. The assessee received donations from a trust during the previous years relevant to the assessment years 1965-66, 1966-67 and 1967-68, in sums of Rs. 15,71,370, Rs. 5,62,432.25 and Rs. 4,78,899.67, respectively. The assessee filed 'nil' returns for all three years, on the ground that it was an educational institution existing solely for educational purposes. The Income-tax Officer closed the assessments stating that there was no taxable income. The Commissioner of Income-tax, in revision,

suo motu, held that assessee was not entitled to exemption, as the exemption under section 10(22) of the Income-tax Act 1961, would apply to educational institutions as such and not to anyone who might be financing the running of such an institution.

The Appellate Tribunal, by a common order for all three years, held that the assessee was an educational institution within the ambit of section 10(22) of the Act. On a reference at the instance of the revenue, the High Court held in favour of the assessee on the ground that the sole purpose for which the assessee had come into existence was education at the levels of college and school and that an educational society could be regarded as an educational institution, if the society was running an educational institution not for the purpose of profit, but its existence was solely for the purpose of education. The revenue appealed to the Supreme Court." Their Lordships of the Supreme Court affirmed the decision of the High Court observing :- "The object of the society was to establish, run, manage or assist colleges or schools or other educational institutions solely for educational purposes and in that regard to raise or collect funds, donations, gifts, etc. Colleges and schools were the media through which the assessee imparted education and effectuated its objects.

In substance and reality, the sole purpose for which the assessee had come into existence was to impart education at the levels of colleges and schools and so, such an educational society should be regarded as an 'educational institution' coming within section 10(22) of the Act. [Emphasis supplied] An educational society or a trust or other similar body running an educational institution solely for educational purposes and not for the purposes of profit could be regarded as 'other educational institution coming within section 10(22) of the Act.'" 9. It is quite apparent that their Lordships have not disapproved the practice of collecting funds through donations, gifts, etc., as long as these were ploughed back into the system itself, i.e., of imparting education. According to the judgment, the decisive or acid test is whether on an overall view the object is one of making profit. No distinction was drawn between donations which were voluntary or otherwise as has been done by the Id. Judicial Member in his order relying upon the decision of the Hon'ble Supreme Court in the case of Safdarjang Enclave Education Society

(supra) which pertained to the levy of Property Tax. In my opinion the aforesaid decision cannot be applied to the facts of the present case since it was delivered in the context of a different enactment and observations would strictly govern only the said Act. It would be more appropriate to seek guidance from the decisions rendered with reference to the provisions of section 10(22) including those of the Apex Court. One can also refer to the well-known decision of the Hon'ble Supreme Court in the case of CIT v. Sun. Engg. Works (P.) Ltd, [1992] 198 ITR 297/64 Taxman 442 which cautions against picking up a word or sentence from the judgment of the SC divorced from the context of the question under consideration and treat it to be the complete law declared by the Court. By recourse to the said judgment, the Ld. Judicial Member has explained what is "charitable" and what is meant by the term "voluntary" but these are again terms for deciding a question under section 11 and not section 10(22).

10. Coming back to the term "incidental" on which great stress has been laid in para 5.3 of the order of the Id. Judicial Member, the facts of the present case do not show any calculated move on the part of the appellant to earn a profit or surplus as alleged since the audited accounts of the preceding assessment year 1992-93 reflect a surplus as is also the position in asst. year 1993-94 but this surplus has resulted from purely educational activities and not on account of receiving donations, loans or admissions fee. Admission fee, donations to the corpus and loans from parents were taken directly to the balance-sheet as noted by the Assessing Officer in the assessment order. He, however, observed that although he was not doubting the "educational nature of the society", he was not in a position to appreciate its "money fleecing activity" and its change from a "charitable institution" at "money making machinery".

11. It is apparent that the Assessing Officer is blowing hot and cold in the same breath ignoring the fact that even in assessment year 1992-93, admission fee was received and taken directly to the balance-sheet in sums of Rs. 1.10 lacs and Rs. 4.03 lacs pertaining to the Public School and Nursery school respectively. Then again in assessment year 1992-93, there was a corpus fund of Rs. 12,64,921 to which was added a sum of Rs. 17,24,005 taken as donation during the assessment year 1993-94. In other words, most of the facts noted by the

Assessing Officer in assessee, year 1993-94 were present in asstt. year 1992-93 as well when benefit of, section 10(22) was allowed as was also done in assessment years 1989-90 to 1991-92 by the Assessing Officer.

No doubt, the principle of res judicata does not apply to tax proceedings and as held by the Id. Judicial Member, the onus is on the assessee to prove its claim from year to year but departure should be on good grounds. If there be no change in facts or the position of law, then the rule of consistency should be kept in mind.

12. My Id. colleague has adverted to certain provisions of the DSE Act, 1973. In para 5.4 of his order, there is a reference to section 146 pertaining to collection of admission fee by "aided schools". In the present case, nobody has recorded a finding of fact whether the appellant comes under the category of an "aided" or "unaided" institution. The accepted fact is that the Schools run by the appellant are "recognised" by the Delhi Administration and a perusal of the audited accounts does not show to any amount received as aid from the Delhi Administration. As regards admission fee, the Id. Counsel stated before the Tribunal that this was a one time receipt always taken directly to the balance-sheet.

13. After this, there is a reference to section 155 of the DSE At, 1973 pertaining to "donations" and the stipulation in the section is that these should not be "levied compulsorily". Here once again the reference is to an "aided" institution and I have already noted earlier that there is no finding on this aspect. That apart, no material is available on record or collected by the tax authorities which would show that such donations or for that matter, the loans were forced on the parents of prospective students or there was an attempt to "fleece money" as is alleged by the tax authorities. Nothing prevented the Revenue from conducting enquiries on random basis after obtaining the addresses of parents from the School authorities.

14. At this stage, I would pause for a moment and refer to certain observations in the orders of the tax authorities about there being complaints against the appellant "taking money from parents" and "raising funds without any purpose". I must categorically state that no evidence was placed before the Tribunal to substantiate these allegations although the Id. D.R. was specifically queried on this aspect. In para 9 of his order, the CIT (A) has observed as under :- "I find that the President

of the society is Mr. Vikram Jeet Ahluwalia and Mrs. K. Ahluwalia is advisor and a member of the executive committee. The society has Mr. PS. Turan the then Principal of the D.P.S. as a member who is known for making money through educational institutions. I also find that the school building is being constructed by Ahluwalia Construction Co. (P.) Ltd. which is a family concern of Ahluwalia who are President and Member in the Society. No tender was called for the construction of the building. By awarding a contract of building to itself the President and Member of the Society have been benefited and the society has been set up as a means of profit earning. Even the rationale for collecting huge donations and loans from parents seeking fresh admissions of their children for construction of building and for the purpose of education go away as I find that during the year the appellant had made addition worth Rs. 1,45,000 only in building account. I also gather from the accounts that most of the bank deposits are in National Bank which is not even a nationalised bank. Surprisingly while taking loans the society went to a nationalised bank but while depositing the money it is benefiting a non-nationalised private bank and the possibility of the members or the executive body getting direct or indirect benefit from investments in a private bank cannot be ruled out." 15. I must say that like the Assessing Officer, the CIT(A) also seems to have been carried away by suspicion and doubt and in the process evidence and facts have been given a go bye. Comments on the persons constituting the Management Committee are not called for and those are expunged. Taking up other comments in para 9 of the order of the CIT(A) : (i) There is no material on record which would show that the building contract to Ahluwalia Construction Co. (P.) Ltd. is at rates above the market rate or there is an undue diversion of funds to the said Company stated to be a "family concern" of the Ahluwalias. The comments are based on suspicion without conducting any enquiry. That apart, the school building was under construction since the earlier years and as per the Schedule of fixed assets for the period ended 31-3-1993 the opening balance as on 1-4-1992 was Rs. 1,03,80,293.

(ii) Another allegation is that funds collected were deposited with a non-nationalised bank and "possibility of the members of the executive body getting direct or indirect benefit cannot be ruled out". All that I would like to say is that decisions cannot be based on possibilities. These have to be tested on the touch-

stone of facts and evidence and not on whims and fancies of the tax authorities. No material has been collected to substantiate the aforesaid allegations or prove that funds collected for educational purposes were siphoned off for private use or gain.

16. The Id. Judicial Member has further observed in his order that no confirmations have been filed in respect of donations as also the loans taken. The explanation of the appellant on these two items is contained in its written submissions as under and addressed to the Tribunal on 4-8-1997 and forming part of a paper book running into 15 pages :- "6. That the corpus donations and other funds were mostly raised from or through the parents of the students admitted to the School, as per accepted past history and only in order to fund the main objects and not for making profits. The said donations have been collected as per the decisions of the representative Managing Committee of the school which has about four to five members nominated by the Education Deptt., Delhi National Territory Government, three-four members from parents and teachers body and has at least 5 to 6 members from eminent educationist and experts from other field. The Society claiming exemption under section 10(22) receives corpus donation, the corpus donations are also exempt as part of total income under section 10(22) as the Society is solely existing for educational purposes and entire donations have been utilised for achieving its educational purposes.

Accordingly in the appellant's case the society received Corpus Donations and treated it as part of total income exempt under section 10(22).

7. The loans and deposits were taken from the parents mainly for liquidation liabilities of the bank loans, creditors and recounting funds of the school. At the beginning of the year the society had over 21.41 lakhs as bank loan and school was incurring huge burden by way of bank interest on these loans. It was therefore decided by the Representative Managing Committee to pay the bank loan and arrange for alternate source of funds at lesser rate of interest.

These facts were submitted before CIT (Appeals) with duly confirmed list of loans from parents for Rs. 8,84,000 and Rs. 43,000. Out of total loans of Rs. 10,85,000, these loans were mostly taken from parents of fresh students and paid back along

with interest at the rate 8% on maturity, which is for 3 years or earlier if the student leaves the school before the date of maturity. The parents are given the receipt of the said loans, with the understanding for payment of interest on making refund on maturity, which have been accordingly paid. A specimen copy of the same is submitted for kind consideration." The learned D.R. on behalf of the revenue has not countered these submissions. It may also be relevant to reproduce paras 8, 9 and 10 of statement of facts before the CIT (A) as under :- "8. The Admission Fees of Rs. 7,12,000 have been shown directly as an addition to the Capital fund while other fees had been taken as income because Admission Fees is in the nature of Capital Receipt whereas the other fees referred to in the order are in the nature of revenue Income. Admission fee is taken only once at the time of admission and the benefit accrues to the school over several years till the child continues studies in the school and therefore, it had been treated as a Capital Receipt and not as income of the year and given a different treatment. Whereas all other fees such as school fees, bus fees, Magazine and other income taken to the income and expenditure a/c are all received on annual basis and pertain to only that particular year and therefore had been treated as income of the year.

No specific clarification was given in this regard because there was no such specific query raised during the course of assessment proceedings and similar treatment had been given in all the preceding financial year by taking the Admission fees directly to the capital fund and accepted by the Assessing Officer.

9. As regards Corpus Donations of Rs. 17,24,005 the matter was discussed and explained in writing as per our letter dated 18th March, 1996 that 'Since there are a large number of donors and the amount paid by each donor is small it is difficult now to get individual confirmation at this stage. However, the Society is assessed under section 10(22) and therefore it is immaterial whether or not those donations are treated as corpus donations or general donations, since the entire income is in any case exempt.

10. As regards loans from parents amounting to Rs. 10,75,000, the assessee was asked to get confirmation only on 8th March, 1996. The School immediately approached those parents who were readily available and arranged for the

confirmation. As most of the loan amounts had been refunded after the stipulated period of three years during December 1995 to March 1996, confirmation was obtained and proof of refund was also given in evidence for the liability created by way of loan.

Since no such time was given and the school was closed after exams the school was not in a position to get the confirmation in all the 147 cases. But school obtained some more confirmation before the date of passing the order and had sent to the ADIT for verification.

As all the loans have been received against proper money receipt and proper identification of the persons and their addresses have been given to the ADIT and the accounts of the Society have been duly audited, non-production of confirmation letters alone cannot be any basis for treating it as undisclosed income of the society." These have not been adversely commented upon by the CIT(A) and nothing in rebuttal is stated by the learned D.R. before the Tribunal. In other words, valid explanations given by the assessee have been ignored by the tax authorities and even the learned Judicial Member has concurred with the views expressed by them. That apart, I really do not understand the necessity for filing confirmations, etc., as it is not disputed by either side that donations and loans were taken by the appellant. Would such confirmations improve the assessee's case in the eyes of the Assessing Officer and the CIT(A) In my opinion, this was an irrelevant factor for examining the claim under section 10(22).

17. We had asked the learned Counsel to file with us the particulars of the Members of the Managing Committee and which was done. This shows that there are nominees of the Education Directorate of Delhi Government on the Committee as also representatives of parents, teachers and educationist, etc., as stated in the submissions. The stand taken by the learned Counsel and rightly so is to the effect that decisions are taken collectively by the Managing Committee whether these be for collection of donations or seeking loans or for any other matter connected with the running of the schools.

18. A few words at this stage about the CBDT Circular F. No. 194/16-17 IT(AI) which is extracted in para 3.8 of the order of the Id. Judicial Member. As already

noted by me there is no evidence on record to show the diversion of funds for personal use of any one much less the "Ahluwalias" who have been adversely commented upon by the CIT(A). It is nobody's case that the stated objects of the Trust are not educational and as already noted by me, there is no evidence to show that the surplus has been generated on a "calculated basis" or that it has been used for "non-educational purposes". In other words, the circular in question is squarely applicable to the case of the appellant and so would be the decision of the Hon'ble Soporific Court in the case of Aditanar Educational Institution (supra) where "an overall view of the matter" is directed to be considered and which is a direct decision pertaining to section 10(22). Further, a distinction has to be drawn between the objects of the appellant institution and the powers of the Managing Committee which collectively took a decision to ask for donations and seek loans to carry on the objects of the institution and on the assumption that such collections were improper, the objects would not become non-educational more so when there was nothing to show that any funds had been diverted for purposes other than educational.

19. Lastly, I would refer to the observations of the learned Judicial Member in paras 5.7 to 5.14 of his order. These, in my opinion, would once again be important for deciding a question under section 11 since section 10(22) only stipulates the existence of a University/educational institution solely "for educational purposes and not for purposes of profit" and I have already discussed at length the facts of the case as also the relevant provisions of law along with the reported decisions reaching in the final analysis to a conclusion that the appellant is engaged in activities which are squarely covered by the provisions of section 10(22) and there is no calculated motive to earn a profit and further there is no evidence with the department which would show that any part of the funds were diverted for purposes other than educational or that these found their way into the pocket of an individual or a group of individuals.

20. In this view of the matter, I allow the assessee's claim for exemption under section 10(22). About the processing of assessee's claim under section 11 some of the JM's observations are likely to prejudice the assessee's case before the Assessing Officer in the eventuality of the Third Member deciding against the

appellant on the question of section 10(22). I, therefore, disassociate myself from such observations.

21. Before I part with the appeal, I would like to state that we are a part of a global educational thought and process and are moving towards a quality centered society. It is education which holds the key to the development of a system which would make young people capable of enriching the Nation through their technical and professional skills.

22. In an educational institution, there are a number of items of expenditure which go into the running of such an institution and to mention a few, salaries and other allowances of the teachers, property tax, cost of land from the DDA and the cost of building as also the maintenance, etc. To this, one can add the inflationary trends from time to time.

23. The right of an individual to a school or to reject, is clear but so is the right of the educational institution to charge for the services provided by it and which it intends to provide in future. In most of the Public Schools, there is the provision of coaches for various games, ground facilities for sports, auditorium, swimming pool, computers, etc. Would it be possible to provide all these in case the institution does not charge a reasonable amount from the parents of the wards at the time of admission whether it be in the form of admission fee, donation, etc. The development of education is a continuous process and the schools all the time have to keep pace in moving ahead and with this goal, it is necessary to undertake various types of financial Commitments in order to come up to the standard expected of them. Even the fully developed schools have to keep adding new facilities and in any case, there is no way out but for the parents to share the cost of such developments.

24. It does not need any detailed deliberation to state that it is not only the business class which feels the necessity to educate its children in Public Schools but this is also the desire of the salaried class whether it be in the Government or the Private sector. Even the people with modest salaries make some sacrifices to ensure that their children get education in good schools and feel that it is worth investing money to meet the educational cost of their children which results in long

range dividends. A good school is an invaluable experience where a pupil is grateful, long afterwards, when he has gone out of the sheltering walls of the school. It is always the feeling that he was given opportunities and provided necessary motivation to fulfil his academic and sporting potential. Even the parents realise that it was worthwhile sending their children to a good public school where they entered as shy children but ultimately came out as confident persons.

25. One cannot compare the system of public schools with other schools to which the Id. Judicial Member has adverted to in his order and any attempt in lowering down the standards of public schools for one reason or the other including lack of fees would deprive the people of their fundamental right of seeking a better quality of life and education.

26. There may be some public schools which commercialise and defame the public schools system but it is for the parents to decide as to whether they would like to admit their children in such schools or they would like to put them in Government schools, etc. However, one thing must be kept in mind and that is that they cannot afford to sacrifice the larger interests of their children by insisting on cheap education which is not complete and is improper in the present times. The schools are built and run on trust and faith and parents are an equal party to it. The Id. Judicial Member in para 5.14 of his order has observed as under :- "5.14 ... We do not think that a school would be prevented from being a charity because the boys who received its benefit paid for their education a moderate sum proportionate to their means." What is a "moderate sum" has to be examined in the light of my aforesaid observations and even if a payment has to be made for obtaining education which is disproportionate to the means of a parent, it would not lead to the conclusion that the object of an educational institution was not so or that it had been set up with a view to make profit or collect a surplus on a calculated basis.

On a difference of opinion between the Members constituting the Division Bench, the following point is referred to the Hon'ble President under section 255(4) of the Income-tax Act, 1961 :- Whether, on the facts of the case and in accordance with

the provisions of law, the assessee's claim for exemption under section 10(22) of the Income-tax Act, 1961 was tenable as held by the Vice President or the claim under the said section was not allowable as per the view of the Judicial Member. On a difference of opinion between the Members, the following point was referred to the Hon'ble President, under section 255(4) of the IT Act : "Whether, on the facts of the case and in accordance with the provisions of law, the assessee's claim for exemption under section 10(22) of the IT Act, 1961 was tenable as held by the Vice President or the claim under the said section was not allowable as per the view of the Judicial Member ?" On the basis of the nomination of the Hon'ble President, under section 255(4) the case has come up before me for consideration and decision.

The brief facts are that the assessee is a Society. This Society was registered on 10-7-1985 with the Registrar of Societies vide No.S-15825. It was also registered under section 12A of the Income-tax Act, 1961 on 15-10-1985. Exemption under section 80G was also granted to the assessee from time to time. The assessee is running two schools in Mayur Vihar styled as Ahlcon Public School and Ahlcon Nursery School. The schools are recognised by the Delhi Administration. It was also stated that up to assessment year 1992-93, the Society was granted exemption under section 10(22) of the Act.

During the relevant assessment year, assessee filed return in Form No.3A claiming exemption under section 10(22) and alternatively under section 11 of the Income-tax Act, 1961. The Assessing Officer denied the claim on the reasoning the Institutions run by the assessee were not solely for educational purposes but for the purposes of earning profit. For coming to this conclusion, the Assessing Officer mainly relied on the collection of admission fee, donation and loans.

Aggrieved by the said order, the assessee took up the matter in appeal before the CIT(Appeals) who upheld the order of the Assessing Officer on the same grounds. The claim for exemption under section 11 of the Act also was denied as, according to the CIT(A), the Society did not do any charitable activities during the year but only engaged itself in business activities.

Still aggrieved the assessee came up in appeal before the Tribunal.

Shri P. L. Juneja, the learned counsel assisted by Shri A. L. Sehgal appeared before the Tribunal and argued at length claiming that the assessee is entitled to the exemption under section 10(22) of the Act.

It was argued that the assessee continues to run the Institutions on the same basis as in the earlier years and on similar facts, there is no reasonable ground for denying exemption allowed in the past. Relying on the decision in the case of Dhansiram Agarwalla (supra), it was submitted that neither the principle of res judicata nor the rule of estoppel is applicable to the assessment proceedings, yet the rule of consistency does apply to such proceedings where there was no change.

The learned counsel further submitted that the Society was not distributing profits nor applying the profits for the benefit of any members of the Managing Committee. The Trustees were empowered to carry on the business. If, however, there is a dissolution, even then the assets will not be distributed to the Members and, therefore, the assessee continues to be running the Society on the basis of its predominant object, i.e., to run the Schools and not to earn profit.

Mere existence of profit will not deprive the Trust the exemption as held in the following cases : 2. Educational Institute of American Hotel & Motel Association (supra).

It was, therefore, urged that the exemption should be allowed in view of the direct decision of the Hon'ble Supreme Court which is binding.

It was further submitted that the purpose of the assessee should not be decided by considering only the parts but it should be with reference to the cumulative effect of all relevant facts. For this proposition, reliance was placed on the decision of the Hon'ble Calcutta High Court in the case of Birla Vidhya Vihar Trust (supra). Reference also was made to the decision in the case of Academy of General Education (supra).

With regard to the admission fees treated as revenue receipt by the Assessing Officer, it was submitted that the same was a capital receipt taken towards the

corpus of the trust fund. In such a case, the same cannot be treated as revenue receipt eligible to tax. In this regard, reliance was placed on the Circular F. No. 194/16-17-IT(AI) (which was reproduced in the body of the order, by the learned Judicial Member).

On the other hand, the learned D.R. supported the order of the CIT(Appeals). Keeping in view the fact that the assessee has been running the Institutions mainly for profit and collecting the funds over and above the actual requirement and against the provisions of the Delhi School Education Act, 1973, the Assessing Officer was fully justified in denying the exemption under section 10(22) of the Act. It was also submitted that the assessee generated surplus fund from year to year in a systematic manner and earned profit in the name of the school. The school building was constructed by a family concern namely Ahluwalia Construction Pvt. Ltd. without calling tender for awarding the contract. It was also submitted that the so-called contributions were not voluntary and was given at the cost of admissions. Relying on the decision in the case of Safdarjung Enclave Education Society (supra), it was submitted that the assessee has been rightly denied the exemption claimed under section 10(22) of the Act.

The learned Judicial Member considered the provisions of section 10(22) of the Act in the light of the decision of the Hon'ble Supreme Court in the case of Surat Art Silk Cloth Mfrs. Association (supra) and it was agreed that where predominant object of the Society is to carry out the charitable purpose and not to earn profit, it would not lose its character of charitable purpose because some profit arises from the activity. The learned Judicial Member also considered the claim in the light of the decision of the Hon'ble Supreme Court in the case of Aditanar Educational Institution (supra) where it was held that the language of section 10(22) of the Act is plain and clear and the availability of the exemption should be evaluated each year to find out whether the institution existed during the relevant year solely for educational purpose and not for purpose of profit. After meeting the expenditure, if any surplus results incidentally from the activity lawfully carried by the educational institutions, it will not cease to be one existing solely for educational purposes, since the object is not to make profit. The decisive or acid test is whether, on an overall view of the matter, the object is to make profit. In evaluating or appraising

the above, one should also bear in mind the distinction/ difference between the corpus, the object and the powers of the concerned entity.

The learned Judicial Member elaborated the word "incidental" used by the Hon'ble Supreme Court and it was his view that the prescription of section 10(22) will hold goods so long as surplus is incidental. The moment it comes out that surplus resulted on a calculated basis, this entitlement under section 10(22) will get vanished. On the basis of the interpretation, it was his finding that the charge of admission fee of Rs. 10,85,000 against section 146 of the DSE Act, 1973 and also the collection of donation to the tune of Rs. 17,24,005 against sections 155 and 156 of the DSE Act, 1973 cannot be said to be incidental to the main purpose.

The learned Judicial Member further considered the basic purpose of education in the light of the national perception which should benefit the public at large. Education according to him is one of the ingredient of the charity and if there is no element of charity the mere running of educational institution will not give the benefit of exemption as held by the Hon'ble Supreme Court in the case of the Safdarjung Enclave Education Society (supra). Having regard to the above facts and the precedence relied upon, it was his view that the Society existed for the purpose of profit and is not covered by the provisions of section 10(22) of the Act.

With regard to the claim of exemption under section 11 the learned Judicial Member held that this issue should be restored to the file of CIT (Appeals) with the direction to decide the issue de novo after providing adequate opportunity to the assessee.

The learned Vice President (the Accountant Member) however, could not subscribe to the view taken by the learned Judicial Member. He agreed with the observation of the learned Judicial Member that there is no specific finding by any of the tax authorities that any part of the profit found its way to the pocket of any individual or individuals or any part of it was utilised for any purpose or purposes which were non-educational in character. The cursory observations in the orders of the tax authorities are in the realm of surmises and conjectures bordering on suspicion and these by no stretch of imagination can replace hard facts.

Coming to the decision cited before the Tribunal, it was his view that the decision of - the Hon'ble Supreme Court in the case of Surat Art Silk Cloth Mfrs. Association (supra) was dealing with the question of exemption under section 11 where the consideration was mainly regarding charitable object and voluntary contributions. Since the case before them is under section 10(22) of the Act, it was his view that the predominant object to be considered is whether it was for imparting of education or just a device for profit making.

With regard to the decision of the Hon'ble Supreme Court in the case of Aditanar Educational Institution (supra), it was his view that the said decision has not been correctly applied by the learned Judicial Member in that the decision in the case of Safdarjung Enclave Education Society (supra) was interpolated. According to him it will not be proper to pick up a word or sentence from the various judgments and decide the issue by ignoring a decision which is direct on the point.

With regard to the term "incidental" on which great stress has been laid by the learned Judicial Member, it was his view that the mere existence of surplus by itself will not deprive the assessee of the benefit of exemption unless such profit was utilised for a purpose other than the main purpose. Since the assessee has not misused or diverted the funds collected by it in the form of admission fee, donation and loans, it was his view that the assessee cannot be denied the benefit of exemption granted earlier.

With regard to the observations of the learned Judicial Member in regard to the provisions of section 146 in regard to admission fee under the DSE Act, 1973 and sections 155 and 156 in regard to donations, etc., of the same Act, it was his view that those provisions were applicable to the case of aided schools by the Government/Municipality. Since there is no evidence of any contribution made by the Government, in the form of financial aid or otherwise, it was his view that these provisions are not relevant for deciding the case of the assessee. Since there is absolutely no findings about and utilisation of the fund for purposes other than the main purpose, which is educational, it was his view that the deduction is rightly allowable as in the earlier years.

Insofar as the observations of the learned Judicial Member in regard to the claim under section 11 of the Act setting aside for fresh consideration, the learned Vice President could not subscribe to the same and noted that he disassociate himself from such observations.

It is against this background that the question extracted above was referred to me for decision. Shri P. L. Juneja learned counsel appeared with Shri A. L. Sehgal, CA for the assessee and Shri D. D. Goyal learned Sr. D.R. appeared with Shri Sanjay Jain, Jr. D. R. The facts as brought on record by the Bench have not been disputed. Shri P. L.

Juneja the learned counsel supported the order of the learned Vice President (Accountant Member). According to him the learned Judicial Member failed to appreciate the arguments placed before him and also failed to discuss the various decisions cited before him. It is reiterated by him that the case of the assessee is the same as in the earlier years. The assessee has been enjoying exemption under section 10(22) of the Act till assessment year 1992-93. In the absence of any distinguishing factor there is no reason for the revenue authorities to depart from the earlier decision. It is submitted that on this ground itself the assessee is to succeed in the light of the decision in the case of Dhansiram Agarwalla (supra). The Hon'ble Supreme Court in the case of Andhra Pradesh State Road Transport Corpn. (supra) held that the income of the charitable trust run on the organised basis is exempt if meant for the object of the Institution. This view has been adopted by the Hon'ble Calcutta High Court in the case of Director of Income-tax (Exemption) v. Shilpam [1998] 230 ITR 126. It is also submitted that the case of the assessee is covered by the decision of the Tribunal in the case of Indian Register of Shipping v. Asstt.

Director of Income-tax (Exemption) [1998] 66 ITD 219 (Mum.) where following the decision of the Supreme Court in the case of Continental Construction Ltd. v. CIT[1992] 195 ITR 81/60 Taxman 429, the Bench held that once the prescribed authority gave its approval it will not be open to the Assessing Officer to question the approval granted by the Competent Authority. Since the assessee has been registered under section 12A of the I.T. Act, it is submitted that the exemption

cannot be denied unless the order of the Commissioner stands overruled or set aside by the appropriate authority.

Shri P. L. Juneja further submitted that the Revenue authorities and the learned Judicial Member went wrong in holding that the main purpose of the assessee was for earning profit and not for running educational institutions as contemplated under section 10(22) of the Act.

According to him. The revenue authorities and the learned Judicial Member were duly influenced by the surpluses on account of admission fee, donations and loans taken by the assessee. However, those admission fees, donations and the loans were taken specifically for the purpose of running the institutions and not for individual benefits or for any other members of the Managing Committee. It cannot defeat the main purpose unless there is specific diversion of these funds. The provisions in the object clause remains the same. The Trustees and the Managing Committee cannot utilise the funds except for the educational purpose. Even in the case of dissolution, the surplus money/assets cannot be distributed among the members or to the trustees, etc. In such a case, it cannot be said that the main purpose of the Society is to make profit. Both the Members of the Bench also agreed that there was no finding by any of the tax authorities that any part of the profit found its way to the pocket of any individual or individuals or any part of it was utilised for any purpose or purposes which were non-educational in character. Relying on the decision in the case of CIT v. Pulikkal Medical Foundation (P.) Ltd [1994] 210 ITR 299/73 Taxman 402 (Ker.), it is submitted that the assessee is entitled to the exemption claimed.

Shri P. L. Juneja the learned counsel further submitted that the issue is no longer res integral as it is fully covered by the decision of the Supreme Court in the case of Aditanar Educational Institution (supra).

According to him collection of donations at the time of admission is no more a bar to granting exemption under section 10(22) as held by the Hon'ble Supreme Court in the above case. Since the learned Vice President (Accountant Member) has correctly followed the decision of the Hon'ble Supreme Court, it is submitted that the exemption under section 10(22) has been rightly allowed by him. The learned

counsel further pointed out that the reliance of the revenue authorities and the learned Judicial Member on the decision of the Supreme Court in the case of Safdarjung Enclave Education Society (supra) was misplaced and had been wrongly applied to deny the claim of the assessee. According to him that decision was rendered under a different Act and it was observed by the Hon'ble Supreme Court itself that the Delhi Municipal Act is departure from other Acts and, therefore, the ruling arising out of Income-tax Act may not be of great help.

Shri P. L. Juneja the learned counsel of the assessee further submitted that the decision of the Hon'ble Judicial Member can be said to be per incurium on the reasoning that the cases cited before the Bench were not properly considered in his judgment and extracts of the decisions placed on the record were not taken into account by him. It is, therefore, submitted that there is no reasonable ground for denying the exemption under section 10(22) of the Act.

On the other hand Shri DD Goyal, the learned Sr. DR vehemently supported the order of the learned CIT(A) and the Hon'ble Judicial Member. According to him the assessee was not allowed exemption under section 10(22) of the Act on the ground that the Society was not found existing solely for educational purposes. This finding was on the basis of the fact that the assessee was collecting admission fees, donations and loans from the parents over and above the regular receipts of school/bus fees and donations and loans were forced on the parents at the time of admission of their cards. Though the loans were claimed refundable bearing interest at the rate of 9%, no evidence was led before the Assessing Officer that the loans were actually refunded to the parents. These donations and loans were taken in spite of enough funds available with the assessee. The learned Sr. DR drew our attention to the various donations collected by the assessee during the year and also the bank balances as per statement filed before us. Since the total receipts of the assessee during the year were much higher than the expenses incurred resulting in huge cash surplus invested into bank fixed deposits and bank accounts, it is submitted that the inference drawn by the Assessing Officer and the CIT(A) is in order and calls for no interference.

Secondly, it is submitted that in regard to the construction of the school building, the society awarded the contract to a concern in which the President and Members of the assessee Society were having substantial interest. By doing this the surplus profits were siphoned off for the benefit of President and the Members of the assessee Society. It is also submitted that though the donations and loans were collected for alleged objective of construction of a building, the actual purpose for collection of the fund was to generate surplus and to earn profits by siphoning it off through the construction work.

The learned Sr. DR further submitted that the enjoyment of exemption in the past years by itself cannot be reason for continuing the exemption as the principles of res judicata do not apply to the income-tax proceedings. Reliance was placed on various decisions including the decision of the Hon'ble Supreme Court in the cases of CIT v. Brij Lal Lohia & Mahabir Prasad Khamka [1972] 84 ITR 273 and Joint Family of Udayan Chinubhai v. CIT [1967] 63 ITR 416.

Shri D. D. Goyal, the learned Sr. DR submitted that in the case of Aditanar Educational Institution (supra), it was held that availability of exemption under section 10(22) has to be evaluated each year to find out whether educational purpose existed during the relevant year solely for educational purposes and not for purpose of profit. Since the assessee has been found to be existing for profit making as evidenced from the statement filed before the Tribunal, it is submitted that the denial of the assessee of exemption under section 10(22) is proper and calls for no interference. Relying on the decision in the case of Surat Art Silk Cloth Mfrs. Association (supra), it was submitted that where the profit making is the predominant object of the activity, the purpose, though an object of general public utility, would cease to be a charitable purpose. In the case of Aditanar Educational Institution (supra) also, it was held that after meeting the expenditure, if any surplus results incidentally from the activity lawfully carried out by the educational institution, it will not cease to be one existing solely for educational purposes in the objects not on make profit. The decisive or acid test is whether on an overall view of the matter, the object is to make profit. Since in this case, the cash surplus of 33.10% generated during the year by the assessee Society cannot be treated as incidental by any stretch of imagination, it is submitted that the decision of the

learned Judicial Member is in line with the view taken by the Apex Court and is liable to be upheld. Even considering the Circular of the Board referred to and relied upon by the assessee, it is submitted that the huge surplus generated by the assessee cannot be in terms of some surplus which can be treated as incidental and germane to the main purpose. Relying further on the decision in the case of Safdarjung Enclave Education Society (supra), it is submitted that the assessee cannot be given the benefit of exemption under section 10(22) of the Act.

The Sr. DR also relied on the provisions of the Delhi School Education Act, and the rules framed under it which provides that no fee, contribution or other charges shall be collected from any student by the Trust or Society running any recognised school whether aided or not. Since the assessee has violated the provisions of DSE Act, it is submitted that the assessee forfeits the exemption contemplated under section 10(22) of the Act.

The learned Sr. DR further drew our attention to the decision of the Hon'ble Calcutta High Court in the case of Birla Vidhya Vihar Trust (supra) for the proposition that the facts of one year are not sufficient to decide the eligibility of exemption under section 10(22) of the Act and the totality of the facts and circumstances in different years should be taken into account. As regards the words "solely" used in section 10(22) of the Act, it is submitted that the same should be held to mean exclusively and not primarily as held by the Hon'ble Rajasthan High Court in the case of CIT v. Maharaja Sawai Mansinghji Museum Trust [1988] 169 ITR 3791 [1987] 33 Taxman 279.

The Assessing Officer taxed both the donations and admission fees as revenue receipts, though the assessee has not shown the donations and admission fees in the income expenditure account. The same were directly taken into account into the balance sheet as capital receipt.

In such a case, the stand of the assessee itself is contradictory since the assessee treated both these receipts as revenue receipts in its income expenditure account for the assessment years 1994-95 and 1995-96. In such a case, the entry in the books would not be decisive and, therefore, the view taken by the Assessing Officer is proper and is in accordance with law.

Finally it is submitted by the learned Sr. DR that registration granted by the Commissioner or the Director of Inspection under section 12A or exemption under section 80G do not bar the Assessing Officer to investigate the true nature and purpose of existence of the Society.

The test and requirements of section 12A or 80G or section 10(22) of the Act are different. The decision of the administrative authority, therefore, cannot bind the Assessing Officer in the discharge of his quasi-judicial functions as held in the case of S. B. Adityan v. First ITO [1964] 52 ITR 453 (Mad.) and CIT v. Bankam Investment Ltd. [1994] 208 ITR 208 (Cal.). The learned Sr. D.R. objected to the order of the Accountant Member on the following point : "(a) In para 3, the Hon'ble Member has held that the decisions of Hon'ble Supreme Court in the case of Add L CIT v. Surat Arts Cloth Mfrs. Association (121 ITR 1) is not applicable in the case of assessee since the requirements of section 11 and section 10(22) are different.

Even though the said decision of the Apex Court is on the provision of section 11, the ratio laid down therein in respect of what is charitable, is relevant and the case of assessee has to be examined on the tests laid down by the Apex Court.

(b) In paras 6-9, the Hon'ble Accountant Member has quoted certain observations of the Hon'ble Supreme Court in the case of Aditnar Educational Institution (224 ITR 310) to hold that educational institutions are not debarred from collecting funds through donations, gifts, etc.

There cannot be any dispute to the aforesaid proposition. The Delhi Schools Education Act, by which the assessee is governed, also permits this practice but with a condition that funds can be raised as per the real needs of the educational institutions and should be utilised only for the purpose/object for which the same were raised.

It should not be collected year after year as a matter of practice.

What the Hon'ble Apex Court held in the above-mentioned case was and which was explained and discussed in detail by Hon'ble Judicial Member was that the

fund collection should not be the predominant object of the society and should not be with the intention to generate surplus and to earn profit. The generation of surplus could only be "incidental" and should be in the realm of "some surplus".

These two terms have been well explained by the Hon'ble Judicial Member in his order.

(c) in para 9, the Hon'ble Accountant Member has held that the decision of the Hon'ble Supreme Court in the case of Safdarjung Enclave Education Society (AIR 1992 SC 1456) is not applicable to the case of assessee since the same pertained to the levy of property tax under the Municipality Act.

The finding of Hon'ble Member is not correct. The basic requirement for exemption under both the Acts is same, i.e., the educational institution should be existing for public charity and philanthropy which is explained by the Hon'ble Supreme Court in the said case.

Hence the ratio of this case is very much relevant and applicable to the case of assessee society as held by the Hon'ble Judicial Member.

(d) In paras 10 & 11, the Hon'ble Accountant Member has held that facts in this year are same as in last year in which the assessee was granted exemption under section 10(22) of the Act. Hence assessee should be granted exemption in this year also by applying the rule of consistency.

The above finding of the Hon'ble Accountant Member is contrary to the decision of Hon'ble S.C. in the case of Aditanar Educational Institution where it was specifically held that availability of exemption has to be evaluated each year irrespective of the fact that the assessee was granted exemption in the earlier years. The rule of consistency applies in respect of facts and decision of a particular year only. If the Assessing Officer had not examined any issue in the earlier year or had examined but decided the same wrongly, can the same wrong be forced to be followed in the subsequent years on the pretext of rule of consistency The reply to this question has been given by Hon'ble Delhi Tribunal in the case of M/s. Shobha Trading Co. (52 ITD 188).

(e) In paras 12-17, the Hon'ble Accountant Member has dealt with the facts of funds collected by assessee in the context of DSE Act. It may be that certain provisions of DSE Act discussed by the Hon'ble Judicial Member are applicable to the "Aided Schools", the intention and object of such provisions are also applicable to other schools.

The assessee society has also violated various other provisions of DSE Act applicable to all schools, whether aided or not, as mentioned supra.

(f) In paras 18-20, the Hon'ble Accountant Member has held that in view of Board's Circular No. 194/16-17-IT(AI), since the funds have not been diverted for purposes other than educational, the exemption is allowable to the assessee society.

The reading of Hon'ble Accountant Member of the said Board circular is incomplete. The Circular also held that the raising of funds should not be done every year on a calculated basis or in a systematic manner. It may result only in "some surplus" and not in substantial surplus. Surplus should be incidental and must not be germane to the profit making activities.

The Hon'ble Accountant Member further held that the existence of an educational institution is sufficient to become eligible for exemption under section 10(22) of the Act. With due respect, the Hon'ble Member has failed to consider the ratio of the Apex Court in the above mentioned cases that to become eligible for exemption from State Taxes, it is necessary that the assessee should be existing for purposes of charity and philanthropy. Imparting of education in itself is not a charity. If education is imparted with a profit motive, it is not charity.

(g) In paras 21-26, the Hon'ble Accountant Member has championed the cause of public schooling holding the every parent want to send his children to a good public school rather than to a Government school, even at the cost of paying more fees and donations, etc., which may be disproportionate to the means of a parent. Hence if a public school collects more funds but provides better quality of education, the same is eligible for exemption from tax." On a careful perusal and consideration of the materials in the record and in the light of the rival submissions and the decisions cited by the parties, it is clear that the availability of exemption

under section 10(22) of the Income-tax Act, 1961 has to be evaluated each year to find out whether the Institution existed during the relevant year solely for educational purpose and not for purpose of profit. And for this finding the decisive or acid test is whether on an overall view of the matter, the object is to make profit. In evaluating or appraising the above, one should also bear in mind the distinction/difference between the corpus, the objects and powers of the concerned entity as held by the Hon'ble Supreme Court in the case of Aditanar Educational Institution (supra).

The assessee is a Society registered with the Registrar of Society since 10-7-1985. The aims and objects of the Society as set forth in its Memorandum of Association are : The name of the Society shall be Shanti Devi Progressive Education Society.

The Registered Office of the Society shall be situated in the Union Territory of Delhi, its present address being at B-4/205, Safdarjung Enclave, New Delhi - 110029.

The aims and objects for which the Society is established are as under : (1) To establish, take over, maintain, promote and develop Schools, Colleges and other educational institutions.

(2) To print, publish, edit, issue or exhibit without any profit motive any literature, books, journals, magazines and other reading materials for the promotion and advancement of the objects of the Society.

(3) To strive for the all around development of the personality of the students so that they may become better citizens of the Society as a whole." Article IV of the Memorandum of Association sets out the scope and power as follows : All the incomes, earnings, movable or immovable properties of the Society shall be solely utilised and applied towards the promotion of aims and objects only as set forth in this Memorandum of Association and no portion thereof shall be paid or transferred, directly or indirectly by way of dividends, bonus, profit or in any other manner whatsoever, to the present or past Members of the Society or to any other persons claiming through anyone or more of the present or past Members of the

Society. No Member of the Society shall have any personal claim on any movable and/or immovable properties of the Society or make any profit, whatsoever, by virtue of his membership." Article 6 of the Rules and Regulations provides for the formation of Governing Body and Article 7 sets out the powers to be exercised by the Governing Body for carrying out the objects of the Society. The Governing Body is given powers to take such actions as necessary for the promotion of the objects of the Society and to facilitate funds and utilise or disburse them in consonance with the attainment of the objects of the Society.

Article 17 of the Rules and Regulations provides the manner in which the assets are to be distributed in the event of its dissolution as follows : (i) The Society may be dissolved as provided under sections 13 and 14 of the Societies Registration Act, 1860.

(ii) If upon dissolution there shall remain any asset after satisfaction of all debts and liabilities of the Society the same shall not be paid to or distributed amongst the Members of the Society but shall be transferred to another Society having similar objects as may be decided by the approval of not less than three fifths of the Members of the Society at a duly convened special General Body Meeting.

(iii) After the dissolution and transfer of remaining properties of the Society, the duly audited final statement of accounts of the Society shall be sent to the Registrar of Societies and the Income-tax Officer having jurisdiction over the Society." It is in this background that the assessee claimed registration under section 12A of the Income-tax Act, 1961 and the same was allowed by the Commissioner of Income-tax. The assessee was also allowed exemption under section 10(22) of the Act till the immediate preceding year, that means assessment year 1992-93. The Assessing Officer has however, made a departure from in the earlier year and denied the exemption under section 10(22) of the Act on the reasoning that the existence of the assessee cannot be said to be solely for educational purposes. It was his view that the money fleecing activity of the assessee was for purpose of earning profit. For coming to this conclusion, he heavily relied on the collection of funds by the assessee in the form of admission fee, donations and loans over and above the legitimate needs of the Society. The

learned CIT(Appeals) upheld the view taken by the Assessing Officer and further held that the accumulation of funds of this proportion cannot be said to be incidentally from the lawful activity especially when the contract for construction of the school building was awarded to a concern in which the members of the Governing Body have substantial interest. It was his view that the funds of the assessee could be siphoned off for the benefits of the Members. Before the Tribunal reference was made to the various decisions of the High Courts and the Supreme Court including the decision in the cases of Safdarjung Enclave Education Society (supra) and Aditanar Educational Institution (supra). The provisions of the Delhi School Educational Act, 1973 were cited contending that the assessee violated the said provisions. The learned Judicial Member, therefore, upheld the view taken by the revenue authorities for the reasons elaborated in the earlier part of this order.

As pointed out earlier, the claim of the assessee is to be considered and examined in the light of the ratio laid down by the Hon'ble Supreme Court in the case of Aditanar Educational Institution (supra). The assessee formed the Society on the basis of the Memorandum of Association and the Rules & Regulations framed in this regard. The Society was registered by the Registrar of Societies and the CIT also accorded registration under section 12A of the Income-tax Act, 1961.

Till the immediate preceding assessment year, the Assessing Officer also allowed the claim of the assessee for exemption under section 10(22) of the Act. There is no change in the Memorandum of Association and the Rules & Regulations during the relevant year. They remained as when the Society was initially formed. The objects of the Society and the powers of the Governing Body remained the same. The Memorandum of Association has even taken care of the distributors of the assets in the case of the dissolution of the Society. There is no change in the predominant object of the activity which is solely for educational purposes. On this basis, there is no provocation for alleging that there is change in its predominant object of the activity and the Society has become a Society existing for purpose of profit.

The next reason given by the Assessing Officer for denying the exemption under section 10(22) of the Act is that the assessee indulged in money fleecing activity by collecting admission fees, donations and loans and, therefore, it deviated from the original activity and turned itself into a Society for purpose of profit and not solely for educational purposes. In coming to this conclusion the revenue authorities relied on the provisions of the DSE Act, 1973 which prohibited collection of admission fees, donations and loans from the students and the parents. However, the objections raised by the revenue authorities cannot be sustained for the following reasons.

The Governing Body of the Society has been authorised by its Memorandum and the Rules & Regulations to raise fund for the promotion of the objects of the Society and to facilitate funds and utilise or disburse them in accordance with the attainment and the objects of the Society.

The assessee has been doing these activities right from the beginning and the same is within the powers given in the Memorandum. There is, therefore, no reason to object to the collection of admission fees, donations and loans during the relevant previous year as the same is within powers given under the Memorandum of Association and the Rules & Regulations framed in this regard. The reliance on the provision of the DSE Act, 1973 is also misplaced as rightly pointed out by the Vice President (the Accountant Member). These provisions which prohibit such collections are applicable only to aided schools and not to unaided schools. There is no evidence on record to show that the assessee received financial or other aids from the Municipal authorities or any Government department. Careful reading of the relevant sections cited before the Tribunal, namely, sections 146, 155 and 156 of the DSE Act, 1973 extracted by the learned Judicial Member at paras 5.4 and 5.5 of his order clearly shows that these provisions are relevant only for aided schools and, therefore, the same will not apply to the case of the assessee. Since the collection of admission fees, donations and loans are within the power of the Governing Body and the prohibitions in the DSE Act, 1973 being not applicable to the case of the assessee, the objection of the revenue authorities in this regard is not tenable and is to be rejected.

With regard to the claim of the revenue that the collection of the fund was beyond the legitimate needs of the assessee, it is seen that this objection was raised by the revenue without going into the details and reasons for which these collections were made by the assessee. The assessee in this case submitted before the revenue authorities that the collections were made to pay off the loans taken earlier for the construction of the building. Even otherwise the Governing Body is given power to mobilise that resources for the promotion of the objects and to facilitate attainment of the objects of the Society. The assessee is not an aided school. It has to bear all the expenses including the infrastructure for establishing schools and maintaining the same. It has already opened and run two schools at Mayur Vihar. The assessee intends to open new branches over and above the existing schools. In such a case, the assessee has to raise corpus fund for building the infrastructure and construction of the building and the facilities required for running the school. Unless the projects set out by the Society are examined, it cannot be said that the assessee collected funds beyond the legitimate needs merely because there was accumulation of funds. It is also seen that the revenue authorities did not point out any case where any part of the profit/income was diverted for a purpose other than for the educational purposes. There is no evidence of any part of the fund (finding its way to the pocket of any individual member or members of the Society). There is unanimity of the Bench in this regard that there was diversion of the fund by the Society. The revenue authorities raise objection in regard to the award of contract for the construction of the school building to a concern which is a family concern in which the Members of the Society have substantial interest. It is, however, pointed out that there was no evidence that that concern namely Ahluwalia; Construction Co. derived any undue profit out of the construction work. It is also seen that the assessee neither distributes any profit nor applied the profits for the benefits of the Managing Committee. In such a case, mere suspicion cannot replace hard facts as pointed out by the learned Vice President (the Accountant Member) in the order. In that view of the matter, the excess funds accumulated by the assessee can be said to be not incidental to the lawful activity of the Society.

Having regard to the above facts, it is seen that the issue is squarely covered by the decision of the Hon'ble Supreme Court in the case of Aditanar Educational

Institution (supra) and the assessee is entitled to exemption under section 10(22) of the Act. I, therefore, concur with the learned Vice President (the Accountant Member).

With regard to the reliance of the authorities on the decision of the Hon'ble Supreme Court in the case of Safdarjung Enclave Education Society (supra), it is seen that the Hon'ble Supreme Court was called upon to consider the provisions of section 115 of the Delhi Municipal Corpn. Act and the question is whether lands and buildings used for educational purposes were for charitable purpose. It is also admitted that the Hon'ble Supreme Court held that education parses not charitable unless element of public benefit or philanthropy is present.

This ruling however is not relevant as section 10(22) of the act does not prescribe charitableness for exemption and the only condition is that it should exist solely for educational purpose and not for purposes of profit. The decision is clearly distinguishable. The Hon'ble Supreme Court itself observed that the rulings arising out of Income-tax Act may not be of great help as in the Income-tax Act "charitable purpose" includes the relief of the poor, education, medical relief and the advancement of any other object of general public utility. The advancement of any other object of general public utility is not found under the Delhi Municipal Corpn. Act. In other words, the decision is narrower in scope., Having regard to this it is to be seen that even if charitable purpose is a precondition for enjoying exemption under section 10(22) of the Act, the decision in this case will not be applicable as the definition of charitable purpose in the Delhi Municipal Corpn. Act is found to be narrower in scope than under the Income-tax Act. The decision is, therefore, of no assistance to the Revenue.

Insofar as other decisions cited, I am of the view that it is no more necessary to elaborate as the issue under consideration is squarely covered by the decision of the Supreme Court relied upon.

The matter with now go before the regular Bench for decision according to majority opinion.

In conformity with the opinion of the majority of the Members of the Income-tax Appellate Tribunal, who have heard this case, including those who first heard it, for the reasons stated in the order, we allow the assessee's appeal.

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